

**United States Department of Labor  
Employees' Compensation Appeals Board**

R.M., Appellant	)	
	)	
and	)	<b>Docket No. 18-1393</b>
	)	<b>Issued: February 12, 2019</b>
DEPARTMENT OF THE AIR FORCE,	)	
AIR COMBAT COMMAND, NELLIS AIR	)	
FORCE BASE, NV, Employer	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On July 9, 2018 appellant filed a timely appeal from a January 16, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated December 23, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

## FACTUAL HISTORY

On November 10, 2016 appellant, then a 55-year-old substance abuse counseling specialist, filed an occupational disease claim (Form CA-2) alleging that she sustained an employment-related aggravation of post-traumatic stress disorder (PTSD), anxiety, and depression. She asserted that she first became aware of her claimed conditions and their relationship to her federal employment on November 15, 2013. Appellant was terminated from the employing establishment, effective December 13, 2013.

Appellant submitted May 6 and December 13, 2013 notification of personnel action forms (Standard Form 50-B) showing her pay as a substance abuse counseling specialist, and core personnel documents from 2012 which generally detailed the duties and standards of the position.

In a November 21, 2016 development letter, OWCP requested that appellant submit additional evidence in support of her claim, including a physician's opinion supported by a medical explanation regarding the cause of her claimed emotional condition. It requested that she complete and return an attached questionnaire which posed various questions regarding the employment-related incidents and conditions which she believed caused or aggravated her claimed condition. OWCP afforded appellant 30 days to respond.<sup>3</sup>

In a December 1, 2016 letter, the employing establishment challenged appellant's claim by asserting that she filed the claim in an untimely manner and failed to submit adequate supporting evidence.

By decision dated December 23, 2016, OWCP denied appellant's claim for an employment-related emotional condition because she failed to establish fact of injury. It found that she did not establish compensable employment factors. OWCP indicated that appellant failed to provide specific details describing the time, date, place, and nature of the implicated employment-related events/conditions. In addition, she failed to provide documenting evidence, such as witness statements, in support of her claim.

On December 27, 2017 appellant requested reconsideration of OWCP's December 23, 2016 decision. In a December 22, 2017 letter, she indicated that she was submitting a packet of documents in support of her claim.

Appellant submitted an undated statement in which she recounted the incidents and conditions at work which she believed caused or aggravated her diagnosed emotional conditions. She indicated that on May 6, 2013 she started working as a substance abuse counseling specialist, a position which involved implementing the Air Force Alcohol and Drug Abuse Prevention and

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<sup>3</sup> Appellant contacted OWCP by telephone on December 21, 2016 and advised that she would not be able to submit additional evidence within 30 days of November 21, 2016.

Treatment (ADAPT) program. Appellant noted that she advised management during the hiring process that she had previously been diagnosed with PTSD, but that it failed to offer support when her PTSD symptoms accelerated. She alleged that she encountered “general hostility” from the ADAPT team members, noting that they were not friendly and would not provide training without prompting. Appellant claimed that she was subjected to unstable leadership in that she had seven different program managers during the seven months she worked at the employing establishment.

Appellant alleged that there was a three-month delay in providing her with credentials to see patients and to access the computer system, a circumstance which she believed adversely affected her ability to perform her job. She claimed that management failed to address her work overload problems, forced her to work overtime in contradiction of her medical work restrictions, and improperly handled pay and leave matters. Appellant indicated that in November 2013 she became anxious when she learned that the ADAPT program manager had been arrested for causing physical injury to his infant daughter.<sup>4</sup> She asserted that supervisors had been very cruel to her and unfairly scolded her for work matters such as her perceived inadequacies in using the computer. Appellant claimed that she faced hostile reactions from management during a November 15, 2013 meeting after she asked for support in performing her work.

Appellant asserted that management failed to adequately protect her after she was placed in serious danger by a patient she was counseling. She claimed that, during a problem solving meeting on November 18, 2013, management “shamelessly humiliated” her regarding her personal safety concerns. Appellant alleged that she was intimidated by face-to-face meetings with managers who unfairly criticized her work performance. She claimed she was wrongly denied union representation at an adversarial meeting with supervisors and that management ignored communications from her union representative. Appellant asserted that she was improperly removed from clinical practice duties in November 2013 and was unfairly terminated from the employing establishment in December 2013.

Appellant submitted a number of documents in support of her reconsideration request, including e-mails sent to appellant by managers who discussed corrective action/training for lapses in her work performance and as well as memoranda in which managers detailed disciplinary actions taken against her.<sup>5</sup> Most of these documents were produced in November and December 2013 and primarily discussed appellant’s problems with logging in scheduled counseling sessions, completing time card records, maintaining appropriate boundaries with patients, and reporting perceived threats to her safety.

In a December 21, 2017 report, Dr. Joseph Hasler, an attending clinical psychologist, reported that appellant’s work environment had triggered her PTSD symptoms by recreating many

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<sup>4</sup> Appellant asserted that this manager told her that he wished to harm three coworkers and that he responded, “I don’t think so,” when she asked whether she was in danger.

<sup>5</sup> The record contains a November 25, 2013 memorandum removing appellant from clinical practice duties and a December 5, 2013 memorandum terminating her from the employing establishment effective December 13, 2013.

dynamics from her family life.<sup>6</sup> Appellant discussed various problems she had at work with her managers and a patient that she counseled. Dr. Hasler reported examination findings and diagnosed complex PTSD with accompanying depression and anxiety. He generally indicated that appellant's job aggravated her psychological symptoms.

By decision dated January 16, 2018, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It noted that appellant submitted documentation in support of her reconsideration request, including an injury statement and copies of memoranda/e-mails, but found that this evidence failed to demonstrate clear evidence of error in the December 23, 2016 decision denying her emotional condition claim.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary, in accordance with the facts found on review, may end, decrease or increase the compensation awarded, or award compensation previously refused or discontinued.<sup>7</sup>

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that a request for reconsideration must be received within one year of the date of its decision for which review is sought.<sup>8</sup> Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System (iFECS).<sup>9</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>10</sup>

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.<sup>11</sup> If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>12</sup>

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<sup>6</sup> Appellant also submitted an undated statement in which she discussed aspects from her personal life which had caused her stress, including verbal and physical abuse since early childhood by her parents, and a debilitating motor vehicle accident which occurred when she was 35 years old.

<sup>7</sup> 5 U.S.C. § 8128(a).

<sup>8</sup> 20 C.F.R. § 10.607(a).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

<sup>10</sup> *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>11</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>12</sup> *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 9 at Chapter 2.1602.5 (February 2016) (the term clear evidence of error is intended to represent a difficult standard).

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.<sup>13</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>14</sup>

The Board notes that clear evidence of error is intended to represent a difficult standard.<sup>15</sup> The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>16</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>17</sup>

### ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. An application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>18</sup> As appellant's request for reconsideration was not received by OWCP until December 27, 2017, more than one year after the issuance of its December 23, 2016 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in its December 23, 2016 decision.

The Board further finds that appellant has not demonstrated clear evidence of error on the part of OWCP in its December 23, 2016 decision.

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<sup>13</sup> *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>14</sup> *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>15</sup> *R.K.*, Docket No. 16-0355 (issued June 27, 2016).

<sup>16</sup> *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 9 at Chapter 2.1602.5(a) (February 2016).

<sup>17</sup> *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>18</sup> *See supra* note 8.

Appellant failed to submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its December 23, 2016 decision.<sup>19</sup> The evidence and argument submitted did not raise a substantial question concerning the correctness of OWCP's decision.<sup>20</sup> The Board notes that OWCP denied appellant's claim on a factual basis, *i.e.*, the failure to establish any compensable employment factors. Appellant submitted a statement in which she discussed the incidents and conditions at work which she believed caused or aggravated her diagnosed emotional conditions. She asserted that management mishandled numerous aspects of her work through its failure to address her concerns about work overload, training, pay/leave matters, union representation, and her personal safety with respect to a manager and a patient she counseled. Appellant asserted that she was unfairly criticized and scolded for her work performance and was subjected to improper disciplinary actions, including her termination in December 2013.

The Board notes, however, that appellant did not explain how this argument raised a substantial question as to the correctness of OWCP's December 23, 2016 decision. Appellant submitted a number of documents, in support of her reconsideration request, including e-mails sent to appellant by managers who discussed corrective action/training for lapses in her work performance as well as memoranda in which managers detailed disciplinary actions taken against her. However, the Board has reviewed these documents and none of them are sufficient to establish an employment factor or otherwise show clear evidence of error in OWCP's December 23, 2016 decision.

Appellant submitted a December 21, 2017 report in which Dr. Hasler, an attending clinical psychologist, noted that appellant reported that her work environment had triggered her PTSD symptoms. Dr. Hasler diagnosed complex PTSD with accompanying depression and anxiety, and he generally indicated that appellant's job aggravated her psychological symptoms. The Board notes, however, that the submission of this report does not establish clear evidence of error in OWCP's December 23, 2016 decision. As previously noted, the underlying issue of this case is not medical in nature. Rather it is factual in nature because appellant's emotional condition claim was denied on December 23, 2016 due to her failure to establish any compensable employment factors. Even if employment factors were established and an evaluation of the medical evidence was undertaken, Dr. Hasler's December 21, 2017 report would not tend to raise a substantial question concerning the correctness of OWCP's December 23, 2016 decision.<sup>21</sup>

The Board finds that appellant's request for reconsideration does not show on its face that OWCP committed error when it found in its December 23, 2016 decision that appellant failed to

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<sup>19</sup> See *supra* note 13.

<sup>20</sup> See *supra* notes 14.

<sup>21</sup> See *supra* notes 18 and 19 regarding the consideration of medical evidence in an emotional condition claim.

establish an employment-related emotional condition.<sup>22</sup> As noted, clear evidence of error is intended to represent a difficult standard.<sup>23</sup>

For these reasons, OWCP properly determined that appellant did not demonstrate clear evidence of error in that decision.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the January 16, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 12, 2019  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>22</sup> See *S.F.*, Docket No. 09-0270 (issued August 26, 2009).

<sup>23</sup> See *supra* note 11.